

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RONALD AND DEBORAH KEAL,

Plaintiffs,

v.

STATE OF WASHINGTON, *et al.*,

Defendants.

Case No. C05-5737RJB

ORDER ADOPTING IN PART AND
RE-NOTING IN PART REPORT AND
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of Magistrate Judge J. Kelley Arnold (Dkt. 240). The Court has considered the Report and Recommendation, the defendants' objections (Dkt. 244), the plaintiffs' objections (Dkt. 246, 248), and the remainder of the file herein.

I. BACKGROUND

The complaint in this action was filed in November of 2005. Dkt. 5. The complaint was deemed deficient, and the plaintiffs were ordered to file an amended complaint. Dkt. 6. That complaint was also deficient, and the plaintiffs filed a second amended complaint on October 24, 2006. Dkt. 183. Two individual defendants in this action have been dismissed, and two have not appeared. *See* Dkt. 247, 249. On November 22, 2006, the remaining thirty-eight defendants in this case moved for summary judgment. Dkt. 204. The Report and Recommendation recommends that

1 the motion be granted in part and denied in part. Dkt. 240. The plaintiffs and defendants have filed
2 objections. Dkt. 244, 246, 248.

3 II. DISCUSSION

4 **A. SUMMARY JUDGMENT STANDARD**

5 Summary judgment is proper only if the pleadings, depositions, answers to interrogatories,
6 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to
7 any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
8 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to
9 make a sufficient showing on an essential element of a claim in the case on which the nonmoving
10 party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no
11 genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of
12 fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
13 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply
14 “some metaphysical doubt.”). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a
15 material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a
16 judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
17 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir.
18 1987).

19 The determination of the existence of a material fact is often a close question. The court must
20 consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a
21 preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*,
22 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving
23 party only when the facts specifically attested by that party contradict facts specifically attested by
24 the moving party. The nonmoving party may not merely state that it will discredit the moving party’s
25 evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*
26 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in
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1 affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*,
2 497 U.S. 871, 888-89 (1990).

3 **B. PATRICIA RIMA**

4 The plaintiffs' claims against Patricia Rima are as follows:

5 Patricia Rima is responsible for the administration and over-seeing of Medical treatment at
6 the Washington State Penitentiary, who evaluates emergency intake grievances and
7 investigation of healthcare issues. On 11-20-03, she was informed of Plaintiff's neck injury by
8 way of emergency grievance, Sgt. Wheeler and Montoya yet, refused Mr. Keal access to
9 Medical for treatment. During the course of Mr. Keal's [sic] stay at this facility deprived him
of adequate medical care on and after 2-2-04 for a hip injury. She directly reviewed and
investigated both grievances logs No. 0402905 & 0402710. Further failed to transfer Mr.
Keal per DOC 610.110 for proper treatment. Thus violating his 8th amendment constitutional
rights by deliberate indifference up to 10-2-04.

10 Dkt. 183 at 13.

11 As the Report and Recommendation makes clear, Patricia Rima does not provide medical
12 treatment, and her supervisory role is an insufficient basis for liability under 42 U.S.C. §1983. Dkt.
13 240 at 5. The plaintiffs' objections fail to state any other basis for holding this defendant liable for
14 Mr. Keal's medical treatment. *See* Dkt. 246 at 2.

15 The Report and Recommendation also concludes that the plaintiffs' claims regarding Patricia
16 Rima's handling of grievances fail because the plaintiffs have no right to a grievance system and that
17 the plaintiffs' claims regarding failure to transfer the plaintiff for medical treatment fail because there
18 is no evidence that a transfer was required or medically necessary. Dkt. 240 at 6. The plaintiffs'
19 objections do not refute this conclusion, and the Report and Recommendation should therefore be
20 adopted.

21 **C. SHERRY HARTFORD**

22 The plaintiffs' claims against this defendant are as follows:

23 Sherry Hartford is responsible for coordinating, supervising religious dispute resolutions, and
24 making decisions on the appeal of religious issues concerning an inmate's right to practice
25 their [sic] faith. She has been notified of Muslims being denied the right to pray on the job
26 and on the big yard at Washington State Penitentiary prior to December 2003 again. Finally,
27 issuing a memo Aug. 26, 2004 only after Aug. 14, 2004 letter by Plaintiff. DOC 560.200
dictates the equal protection/treatment of those similarly situated with religious beliefs and
practices. A halal diet is similar to kosher which those of the Jewish faith receive. Defendant
is at the second level of appeal for religious rights. Plaintiff has a right to proper diet in

1 accordance with his religious beliefs and practices.

2 Dkt. 183 at 11. The Report and Recommendation concludes that Sherry Hartford is sued only in her
3 supervisory capacity because there is no evidence that she played a role in the alleged denial of Mr.
4 Keal's right to pray with others and to receive a Halal diet. Dkt. 240 at 6. The objections assert that
5 this defendant knew of these alleged denials and was a participant rather than merely a supervisor,
6 but the plaintiffs fail to cite evidence supporting these assertions. The Report and Recommendation
7 should be granted in this regard.

8 **D. RICHARD MORGAN**

9 The plaintiffs' claims against Richard Morgan are based upon this defendant's alleged
10 "responsib[ility] for the safety, welfare, [and] security of inmates," awareness of alleged
11 constitutional violations, and role in the grievance process. Dkt. 183 at 11. As noted by the Report
12 and Recommendation, the plaintiffs' conclusory arguments are an insufficient basis for imposing
13 liability. The Report and Recommendation should be granted as to Richard Morgan.

14 **E. SHARON MORGAN**

15 Sharon Morgan is in charge of administration and oversight of medical personnel at Clallam
16 Bay Correction Center and is sued on this basis of her role as supervisor and her involvement in the
17 grievance process. *See* Dkt. 183 at 17-18. The objections fail to demonstrate any other involvement
18 of Ms. Morgan in the alleged violation of the plaintiffs' constitutional rights, and this defendant
19 should therefore be dismissed.

20 **F. SANDRA CARTER**

21 The plaintiffs allege that Sandra Carter denied Mr. Keal a Halal diet, an Islamic sponsor,
22 access to a dietician, access to the law library, medical treatment, and time in the yard. Dkt. 183 at
23 13-14. The plaintiffs also contend that Sandra Carter mishandled Mr. Keal's grievances. *Id.* After
24 reviewing the plaintiff's exhibits in support of these allegations, the Report and Recommendation
25 concludes that the plaintiffs' claims against this defendant are based solely on the theory of
26 *respondeat superior*. In their objections, the plaintiffs reiterate that this defendant is involved in the
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1 grievance process. The plaintiffs cannot establish a constitutional right to a prison grievance system.
2 *See Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). The plaintiffs having failed to establish any
3 other basis for imposing liability on this defendant, the Report and Recommendation should be
4 adopted in this regard.

5 **G. HAROLD CLARKE**

6 The Report and Recommendation concludes that the plaintiffs' claims against this defendant
7 are based solely on the theory of *respondeat superior*. Dkt. 240 at 8. The plaintiffs' objections assert
8 that Harold Clarke had direct knowledge of alleged constitutional violations by other individuals and
9 was involved in the grievance process. The plaintiffs fail to demonstrate Harold Clarke's personal
10 involvement in the violation of constitutional rights, and the Report and Recommendation should be
11 adopted in this regard.

12 **H. ELDON VAIL**

13 The Report and Recommendation recommends that the defendants' motion be granted as to
14 Eldon Vail because the plaintiffs' allegations, that Mr. Vail placed Mr. Keal on Intensive
15 Management Status and failed to release him from such status, are not supported with evidence of
16 Mr. Vail's personal participation. In their objections, the plaintiffs allege that Mr. Vail is involved in
17 the grievance process and had direct knowledge of alleged constitutional violations by other
18 individuals. This is an insufficient basis for imposing liability, and the Report and Recommendation
19 should be granted in this regard.

20 **I. DEAN MASON**

21 The allegations against Dean Mason in the Amended Complaint are based upon Mr. Mason's
22 involvement in the grievance process. As the Report and Recommendation concludes, the plaintiffs
23 fail to demonstrate that Mr. Mason personally participated in a violation of their constitutional rights.
24 The plaintiffs contend that the Report and Recommendation is contradictory because it notes that
25 there is no constitutional right to a grievance procedure but that prisoners cannot be retaliated
26 against for using grievance procedures. *See, e.g.*, Dkt. 240 at 27. The Court does not find these
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1 statements of the law to be contradictory, and the plaintiffs have not demonstrated that Dean Mason
2 retaliated against Mr. Keal for use of the grievance procedure.

3 **J. HALAL DIET**

4 According to the Amended Complaint, Daniel Williams, William Peck, Donald Duncan, and
5 Steven Brill violated Mr. Keal's constitutional rights by denying Mr. Keal a Halal diet that includes
6 meat. The Report and Recommendation concludes that the plaintiffs fail to demonstrate that
7 receiving an ovo-lato diet that does not contain meat violated Mr. Keal's constitutional rights. Dkt.
8 240 at 10. The plaintiffs offer no authority for the contention that Muslim prisoners must be provided
9 Halal meat, and the Third Circuit has held that providing vegetarian meals to Muslim prisoners is
10 sufficient. *See Williams v. Morton*, 343 F.3d 212, 218 (3d Cir.2003) ("[P]roviding vegetarian meals,
11 rather than Halal meals with meat, is rationally related to the legitimate penological interests in
12 simplified food service, security, and staying within the prison's budget."). The plaintiffs' having failed
13 to demonstrate a constitutional right to Halal meat, the Court should adopt the Report and
14 Recommendation as to this claim.

15 **K. RELIGIOUS SPONSOR**

16 The plaintiffs allege that Mr. Keal was wrongfully denied a Muslim sponsor. The Report and
17 Recommendation concludes that summary judgment on this claim is proper because the Constitution
18 does not mandate that prison officials provide sponsors for every religious group. Dkt. 240 at 11.
19 The plaintiffs offer no authority to rebut this conclusion, and the Report and Recommendation
20 should be granted in this regard.

21 **L. PRAYER**

22 The Report and Recommendation determines that the plaintiffs' claims regarding prayer at
23 work and in the yard are unexhausted because Mr. Keal failed to timely file a grievance. Dkt. 240 at
24 11. The plaintiffs' objections do not refute this conclusion. This claim should be dismissed without
25 prejudice.

26 **M. EXCESSIVE FORCE**

1 The plaintiffs bring claims under 42 U.S.C. §1983, contending that the use of force by
2 defendants Mark Abbott and Steve Weed was excessive.

3 **1. Mark Abbott**

4 The plaintiffs' allegation against Mark Abbott is as follows:

5 Mark Abbott is responsible for an excessive use of force upon MR. KEAL on or about 2-2-
6 04, resulting in a hip injury. Defendant acted under the Color of State law, the legitimacy of
7 the Government and were purporting to act there under [sic], violating Plaintiff(s) 8th and
14th U.S. Constitutional Amendment Right(s) and is being sued in his/her official and
individual capacity.

8 Dkt. 183 at 12. This allegation stems from an incident in the "Big Yard." Mr. Keal was involved in a
9 fight with another inmate and ordered to stop fighting and lie on the ground. Mr. Keal did not
10 comply and instead kneeled on one knee with his back to the corrections officers. In the plaintiffs'
11 objections Mr. Keal contends that he was attempting to lie down and was tackled by Mark Abbott.
12 Dkt. 246 at 1.

13 To support a claim for cruel and unusual punishment, the plaintiffs must "allege and prove the
14 unnecessary and wanton infliction of pain," and courts should pay "due regard for differences in the
15 kind of conduct against which an Eighth Amendment objection is lodged." *Whitley v. Albers*,
16 475 U.S. 312, 320 (1986). Where the conduct is taken in response to disturbance threatening
17 security of inmates and prison staff, the question is whether "whether force was applied in a good
18 faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of
19 causing harm." *Id.* at 321. As detailed in the Report and Recommendation, the plaintiffs fail to
20 demonstrate that the force used to acquire Mr. Keal's compliance with the order to lie down was not
21 part of a good faith effort to restore discipline. Dkt. 240 at 4. The Report and Recommendation
22 should be granted in this regard, and the motion should be granted as to Mark Abbott.

23 **2. Steve Weed**

24 The Report and Recommendation recommends that the Motion for Summary Judgment be
25 denied as to defendant Steve Weed because the defendants' briefing on Defendants' Motion for
26 Summary Judgment did not address the plaintiffs' excessive force claim against Steve Weed. Dkt.

240 at 28. While the motion purports to address all claims, the defendants admit that the motion omits the claim of excessive force on November 17, 2003. The defendants object to the Report and Recommendation on the grounds that this claim was already dismissed and no briefing was necessary. Dkt. 244 at 2. The defendants ask that if the Court determines that the excessive force claim has not been dismissed, the Court should allow supplemental briefing on the issue. *Id.* at 9.

On June 9, 2006, Steve Weed and other defendants moved for judgment on the pleadings, in part on the grounds that Mr. Keal failed to exhaust grievance procedures. Dkt. 137 at 4. In addressing whether the plaintiffs' excessive force claims were exhausted, the Report and Recommendation concluded that the plaintiffs' excessive force claims were exhausted only with respect to an incident occurring on February 2, 2004. *See* Dkt. 162 at 10 ("There is only one grievance[] supporting the third cause of action, excessive use of force. (Dkt. # 137, Exhibit 1, Attachments F). This issue is confined to the use of force in the Big Yard at the Washington State Penitentiary on February 2nd, 2004."). This Court adopted the Report and Recommendation. Dkt. 176.

The plaintiffs were allowed to amend the complaint a second time as to certain defendants and certain allegations; they were not explicitly permitted to amend their excessive force allegations or their allegations against Steve Weed. *See* Dkt. 176 at 2. The Second Amended Complaint's allegations against Steve Weed are as follows:

Steve Weed is responsible for excessive use of force upon MR. KEAL on 11-17-03 resulting in a severe neck injury. Upon MR. KEAL'S return to (CBCC) 1-5-05 to 9-12-05, he subjected him to ongoing pattern of practice retaliatory harassment, threats, intimidation and theft of legal documents. Defendant acted under the Color of State law, the legitimacy of the Government and were purporting to act there under [sic], violating Plaintiff(s) 8th and 14th U.S. Constitutional Amendment Right(s) and is being sued in his/her official and individual capacity.

Dkt. 183 at 14. The defendants' answer addressed these allegations, denying that Steve Weed's use of force was excessive. Dkt. 187 at 7.

The plaintiffs' allegations, assuming that the plaintiffs were permitted to amend their excessive force claim against Steve Weed, are theoretically still subject to the earlier ruling that only

1 the excessive force claim pertaining to the Big Yard in February of 2004 was exhausted. It appears,
2 however, that the parties have not yet been fully heard on the plaintiffs' claims regarding Steve
3 Weed's alleged use of force on November 17, 2003. The defendants ask the Court to allow
4 supplemental briefing on this issue rather than allow this claim to proceed to trial. In the interests of
5 fairness to both parties, the Court should allow the parties to provide supplemental briefing on the
6 plaintiffs' excessive force claim against Steve Weed stemming from events that occurred on
7 November 17, 2003. The Court should therefore decline to adopt the Report and Recommendation
8 in this regard and establish a briefing schedule for the parties to be heard on this limited issue.

9 **N. RAMADAN 2003**

10 The plaintiffs contend that Defendant Donald Duncan denied Mr. Keal the ability to fast
11 during Ramadan in 2003 because Mr. Keal was not provided sack lunches. Dkt. 183 at 19. Mr. Keal
12 admits that in the months before Ramadan, he completed a religious preference form indicating that
13 he was Rastafarian. Dkt. 246-2, Exh. 1 at 5. In the objections, Mr. Keal contends that he signed the
14 form under duress. The basis for this contention is unclear, but it appears that Mr. Keal felt
15 compelled to change his religious preference in order to justify his refusal to cut his dreadlocks, in
16 violation of Department of Corrections policy, and to seek release from Intensive Management
17 Status. *Id.* As explained below, Mr. Keal fails to justify his violation of the policy on dreadlocks. Mr.
18 Keal fails to offer evidence to create a genuine issue of material fact as to whether the Rastafarian
19 religious preference was made under duress. There being no dispute that Mr. Keal professed to be
20 Rastafarian during Ramadan in 2003, the Report and Recommendation should be adopted, and
21 summary judgment should be granted on this claim.

22 **O. RAMADAN 2005**

23 Prison inmates retain their First Amendment right to practice their religion freely, but that
24 right is limited by virtue of their incarceration. *Friend v. Kolodziejczak*, 923 F.2d 126, 127 (9th Cir.
25 1991). To establish a free exercise violation, plaintiffs must show that the defendants burdened the
26 practice of religion by preventing conduct mandated by faith, without any justification reasonably
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1 related to legitimate penological interests. *Freeman v. Arpaio*, 125 F.3d 732, 736 (9th Cir. 1997). To
2 determine whether the conduct of prison officials was reasonable, courts consider several factors,
3 including whether the regulation has a logical connection with a legitimate government interest;
4 whether the inmate has an alternative means to exercise the asserted right; and the severity of the
5 impact that accommodating the inmate's would have upon prison resources. *Id.*

6 The plaintiffs' claim against Steven Brill regarding the burden of Mr. Keal's religious practice
7 is as follows:

8 MR. KEAL is being denied a Halal meat diet and has went without meat while Jewish
9 inmates receive a similar diet "Kosher," as a Muslim Keal has had not [sic] Islamic sponsor
and was denied the right to fast 5 days of Ramadan as well as the right to eat the food from
Eid Al Fitr Feast on or about 10-8-05. See grievance log #0523458.

10 Dkt. 183 at 24. The defendants contend that Steven Brill is entitled to summary judgment because he
11 is entitled to qualified immunity and because the plaintiffs fail to sufficiently allege that Mr. Keal's
12 practice of religion was intentionally and substantially burdened.

13 The defense of qualified immunity has three steps. First, there must be a violation of a
14 constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). At this stage, the facts are viewed in
15 the light most favorable to the injured party. *Id.* Absent such a violation, there is no need to pursue
16 the remaining qualified immunity analysis. *Id.* Second, the right must be so clearly established that a
17 reasonable officer would be on notice of its existence and parameters. *Id.* at 199; *Romero v. Kitsap*
18 *County*, 931 F.2d 624, 627 (9th Cir. 1991). This burden rests with the plaintiff. *Romero*, 931 F.2d at
19 627. Third, the officer must demonstrate that a reasonable officer could have believed the conduct
20 was lawful. *Id.* With respect to qualified immunity, the Report and Recommendation notes that the
21 defendants "have not supplied the exhibits they rely on for the proposition that the named defendant
22 could have thought his actions constitutional." Dkt. 240 at 13-14.

23 **1. Constitutional Violation**

24 The Report and Recommendation concludes that the plaintiffs successfully allege a
25 constitutional burden by alleging that Mr. Keal was denied the ability to fast during Ramadan
26 because he was not provided sack lunches despite properly declaring his religious preference and
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1 requesting sack lunches. Dkt. 240 at 13. The defendants object on the grounds that there is no
2 evidence that the denial was intentional and because the denial lasted only five days. Dkt. 244 at 4.
3 The defendant's cite Mr. Keal's deposition statement acknowledging that he may have been denied
4 Ramadan due to a miscommunication. Dkt. 204 at 6. This evidence was not provided to the Court.
5 Dkt. 244 at 5 n.1.

6 The defendants do not offer authority for the proposition that the burden on the plaintiff's
7 free exercise must be intentional. *See* Dkt. 244. 42 U.S.C. §1983 does not impose an intent
8 requirement, but the Supreme Court has cautioned that the purpose of 42 U.S.C. §1983 is to remedy
9 "affirmative abuse[s] of power." *See Daniels v. Williams*, 474 U.S. 327, 329-30 (1986). The state of
10 mind requirement is determined by the underlying constitutional right and not by Section 1983 itself.
11 *See id.* at 330. For example, in the context of the Due Process Clause, the word "deprive" has been
12 deemed to connote more than mere negligence. *Id.* The Court is aware of no binding authority
13 mandating that burdens on free exercise be intentional.

14 In support of their contention that inability to observe Ramadan for five days is not a
15 sufficiently substantial burden on free exercise, the defendants cite *Boyd v. Lehman*, No. C05-0020,
16 slip op. (W.D.Wash. May 19, 2006). In that case, the plaintiff was served meals before sunset for
17 two days of Ramadan and provided sack lunches to eat later in the evening. *Id.* at 2 n.2. In that case,
18 the court concluded as follows:

19 Plaintiff's assertions to the contrary, there is no evidence in the record that defendant
20 Haptonstall acted intentionally to burden the practice of plaintiff's religion. The record instead
21 supports the conclusion that the issue regarding the timing of the evening meal was, at most,
22 a mistake, and does not rise to the level of a constitutional violation. Accordingly, defendants
are entitled to summary judgment with respect to plaintiff's First Amendment claim as it
pertains to fasting during Ramadan 2004.

23 *Id.* at 9. This case is readily distinguishable. Here, Mr. Keal was denied sack lunches altogether, the
24 denial lasted five days rather than two, and there is no evidence in the record supporting the
25 conclusion that the denial was a mere mistake. The Court should adopt the Report and
26 Recommendation and hold that the plaintiffs have sufficiently alleged that Steven Brill violated Mr.

1 Keal's freedom of religious practice.

2 **2. Clearly Established and Reasonable Belief**

3 Under established law, prison authorities must accommodate prisoners' rights to receive a
4 diet that "satisfies the dietary laws of their religion[s]." *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th
5 Cir. 1987). What is not clearly established, however, is whether a temporary and unintentional
6 deprivation of the right to receive a religious meal violates the Free Establishment Clause. The word
7 "prohibiting" in the Free Exercise Clause connotes more than mere negligence. *See Lewis v.*
8 *Mitchell*, 416 F. Supp. 2d 935, 944 (S.D.Cal. 2005); *Shaheed v. Winston*, 885 F. Supp. 861, 868
9 (E.D.Va. 1995). A reasonable prison official could therefore conclude that an unintentional failure to
10 provide a religious meal did not arise to a constitutional violation. In this case, there is no evidence
11 that the failure to provide Mr. Keal with sack lunches was anything other than mere inadvertence.
12 The Court should therefore hold that Steven Brill is entitled to qualified immunity on this claim.

13 **P. DREADLOCKS**

14 The Report and Recommendation concludes that the Department of Corrections policy
15 prohibiting inmates from wearing their hair in braids or ties is reasonably related to legitimate
16 penological interests. Dkt. 240 at 14. The Report and Recommendation urges the Court to grant the
17 Motion for Summary Judgment as to Defendants Carter, Blakeman, and Moore in this regard. *Id.* at
18 241. The plaintiffs object on the grounds that the policy against dreadlocks impacted African
19 Americans more severely. Dkt. 246 at 6. Specifically, the plaintiffs contend that African Americans
20 wearing dreadlocks are required to cut their hair to comply with the policy whereas other racial
21 groups can simply comb their hair to remove dreadlocks. *Id.* at 7.

22 Proof of racially discriminatory intent or purpose is required to uphold a racial discrimination
23 claim, and mere evidence of disparate impact on minorities is insufficient. *See Village of Arlington*
24 *Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington v.*
25 *Davis*, 426 U.S. 229, 239-40 (1976). Because the plaintiffs fail to demonstrate the requisite
26 discriminatory intent or purpose, the Report and Recommendation should be adopted as to this
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1 claim.

2 **Q. NO MOVEMENT**

3 The Report and Recommendation recommends that the Court deny the Motion for Summary
4 Judgment as to the plaintiffs' claim that Mr. Keal was held on no movement status in violation of the
5 Eighth Amendment. Dkt. 240 at 16. According to the Report and Recommendation, it is impossible
6 to discern from the record exactly how long Mr. Keal was on no movement status, beginning on
7 August 26, 2003, or whether the defendants' subjective motivation behind the no movement status
8 was deliberately indifferent. *Id.* The Report and Recommendation would deny qualified immunity on
9 the grounds that the defendants should have been on notice that they could not deny outdoor
10 exercise for a prolonged period of time exceeding six weeks. Dkt. 240 at 17.

11 The Report and Recommendation cites *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000), and
12 *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979). In *Lopez*, the court reversed summary judgment in
13 favor of the defendant on the claim that a prisoner was denied outside exercise for over six weeks for
14 the prisoner's own protection after he suffered an injury. *Lopez*, 203 F.3d at 1133. In *Spain*, the
15 court held that "it was cruel and unusual punishment for a prisoner to be confined for a period of
16 years [in order to prevent violent attacks to, and by, the inmates] without opportunity to go outside
17 except for occasional court appearances, attorney interviews, and hospital appointments." *Spain*, 600
18 F.2d at 200.

19 This case is distinguishable because Mr. Keal was denied the opportunity for outdoor
20 exercise because he was in violation of a lawful Department of Corrections policy. Mr. Keal was
21 capable of lifting the ban on outdoor exercise by complying with the policy against dreadlocks, unlike
22 the prisoners in *Lopez* and *Spain*, who were denied outside recreation due to past events. Mr. Keal
23 was placed on no movement status because he failed to remove his dreadlocks as required
24 Department of Corrections policy prohibiting inmates from wearing their hair in braids or ties, a
25 policy that the Court has determined serves penological interests as a matter of law. Even if the
26 Court were to agree that Mr. Keal states a constitutional violation for prolonged placement on no
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1 movement status, the Court determines that a reasonable officer could have believed that placement
2 of Mr. Keal on no movement status was lawful in light of Mr. Keal's power to terminate the no
3 movement status by complying with the lawful policy prohibiting dreadlocks. The Court should
4 therefore decline to adopt the Report and Recommendation and hold that Defendant Blakeman is
5 entitled to summary judgment on this claim.

6 **R. VERBAL MISCONDUCT**

7 The plaintiffs contend that Steven Blakeman, Brian Zavodny, Randall Judd, and Steven Weed
8 made racial slurs or verbal threats. Dkt. 183 at 14, 20, 23. As the Report and Recommendation
9 notes, verbal harassment does not rise to the level of a constitutional violation. Dkt. 240 at 17. The
10 legal authority cited in the objections does not contradict this statement of the law. *See Turner v.*
11 *Marshall*, 63 F.3d 807 (9th Cir. 1995) (petition for writ of *habeas corpus*). The Report and
12 Recommendation should be adopted as to claims of verbal misconduct.

13 **S. ACCESS TO COURTS**

14 The plaintiffs contend that Mr. Keal was denied access to courts. The Report and
15 Recommendation concludes that Mr. Keal fails to demonstrate actual injury. Dkt. 240 at 17. The
16 objections offer two pieces of evidence to refute this conclusion, both of which were addressed in the
17 Report and Recommendation and both of which demonstrate Mr. Keal's ability to file motions and
18 otherwise access the court. Dkt. 240 at 18. The Report and Recommendation should be adopted as
19 to this claim.

20 **T. MEDICAL CLAIMS**

21 The plaintiffs assert that the medical treatment provided by Alena Montoya, Robert Monger,
22 John Joseph, Allen Hayter, Robert Signor, and Lisa Long was inadequate.

23 **1. Alena Montoya**

24 The plaintiffs' claims against Alena Montoya are as follows:

25 Alena Montoya is responsible for internal daily operations of security at the Penitentiary. On
26 or about 11-19-03 MR. KEAL arrived on the chain from Clallam Bay Correction Center
27 complaining of a severe neck injury. Lt. Montoya caked (CBCC) who denied any event had
taken place and even though MR. KEAL called a medical emergency, she refused to

1 authorize clearance to medical for an examination.

2 Dkt. 183 at 12. The Report and Recommendation concludes that summary judgment is proper as to
3 Alena Montoya because Mr. Keal was seen on November 20, 2003, the day Mr. Keal arrived at the
4 Washington State Penitentiary, and six days thereafter. Dkt. 240 at 19. The objections acknowledge
5 that Mr. Keal was seen on November 20, 2003, but contend that treatment was delayed from
6 November 17, 2003, to November 25, 2003. Dkt. 246 at 8. The objections cite witness statements
7 (Dkt. 216-16, Exh. 36 at 11-15) and Mr. Keal's affidavit (Dkt. 246-3, Exh. 2) as evidence
8 supporting this claim. The witness statements are not signed under penalty of perjury. *See* Dkt. 216-
9 16, Exh. 36 at 11-15. Mr. Keal's affidavit states that Mr. Keal was told that emergency treatment
10 was not necessary and that a final decision from Alena Montoya was required. Dkt. 246-3, Exh. 2.
11 The plaintiffs fail to demonstrate that Mr. Keal actually declared an emergency during this time
12 period. *See* Dkt. 204-10 at 6. The Report and Recommendation should be adopted as to this claim.

13 **2. Robert Monger**

14 The plaintiffs' allege that Robert Monger improperly ordered the use of leg restraints,
15 handcuffs, and a spit sock during an alleged seizure in March of 2005. Dkt. 183 at 18. The Court has
16 already ruled that the plaintiffs fail to demonstrate that Mr. Keal injuries were sufficiently serious to
17 amount to a violation of the Eighth Amendment. Dkt. 247 at 4-6, Dkt. 249 at 3-5. The motion
18 should be granted as to this defendant.

19 **3. John Joseph, Allen Hayter, Robert Signor, and Lisa Long**

20 The Report and Recommendation thoroughly addresses the plaintiffs' claims that John
21 Joseph, Allen Hayter, Robert Signor, and Lisa Long were deliberately indifferent to serious medical
22 needs.

23 **a. Hip Pain**

24 The Report and Recommendation concludes that summary judgment is proper on the claim
25 that the defendants were deliberately indifferent to Mr. Keal's hip pain because the plaintiff was seen
26 and his complaint was evaluated. Dkt. 240 at 22. The plaintiffs contend that failure to prescribe
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1 physical therapy or medication after Mr. Keal's MRI results came back normal constitutes deliberate
2 indifference. Dkt. 246 at 10. The plaintiffs may disagree with the defendants' determination that no
3 further treatment was warranted in light of Mr. Keal's MRI result, but such a disagreement does not
4 support a claim under 42 U.S.C. §1983. The Report and Recommendation should be adopted as to
5 this claim.

6 **b. Allergies**

7 The Report and Recommendation concludes that Mr. Keal was treated on both occasions
8 when he reported allergy problems and that the plaintiffs fail to demonstrate that Mr. Keal suffered
9 injury. The objections evidence the plaintiffs' disagreement with John Joseph's lack of treatment of
10 Mr. Keal's allergies but fail to offer any specific instance when Mr. Keal's allergy complaints were
11 not addressed or evidence that Mr. Keal's allergies resulted in seizures or other injury. The Report
12 and Recommendation should be adopted as to this claim.

13 **c. Neck Pain**

14 The Report and Recommendation concludes that Mr. Keal's neck condition "requires
15 periodic medical treatment" and that Mr. Keal has received such treatment. Dkt. 240 at 23. In their
16 objections, the plaintiffs contend that x-rays of Mr. Keal were ordered on November 26, 2003, but
17 that Mr. Keal was not x-rayed until July of 2005. Dkt. 246 at 11. The plaintiffs fail to demonstrate
18 that this delay had any effect on Mr. Keal's condition. The Report and Recommendation should be
19 adopted as to this claim.

20 **d. Hypoglycemia**

21 The Report and Recommendation deems the plaintiffs' arguments regarding Mr. Keal's
22 alleged hypoglycemia as a difference of opinion with Dr. Hopfner, who is not a party to this action
23 and determined that Mr. Keal's hypoglycemia did not justify extra food. Dkt. 240 at 24. In the
24 objections, the plaintiffs point to the fact that Mr. Keal was provided extra food at other facilities and
25 contend that Mr. Keal suffered seizures and rapid weight loss. The plaintiffs fail to support this
26 contention with a citation to the record, and the Report and Recommendation should be adopted as
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1 to this claim.

2 **e. Seizures**

3 As noted by the Report and Recommendation, various medical providers suspected that Mr.
4 Keal was pretending to have seizures. Dkt. 240 at 24-26. The plaintiffs dispute this evaluation and
5 the type of care Mr. Keal received for his alleged seizures but do not demonstrate deliberate
6 indifference by the defendants. The Report and Recommendation should be adopted as to this claim.

7 **U. RETALIATION**

8 The Report and Recommendation concludes that the plaintiffs' retaliation claims cannot
9 survive summary judgment because Mr. Keal was infracted for filing false grievances and there is no
10 evidence that Mr. Keal was infracted merely for filing grievances. Dkt. 240 at 26-27. To rebut this
11 conclusion, the plaintiffs contend that prison officials "have [a] long history in [sic] protecting their
12 colleagues from any possible litigation by attempting to discredit inmates who lodge complaints of
13 any nature against them." Dkt. 246 at 12. The plaintiffs' mere belief or suspicion that the infractions
14 were retaliatory is not enough to withstand summary judgment. The Report and Recommendation
15 should be adopted as to this claim.

16 **V. VISITATION**

17 The Report and Recommendation concludes that Ms. Keal cannot establish a due process
18 violation for denial of visitation with her husband because she was afforded, and utilized, an appeal
19 process. Dkt. 240. In the objections, the plaintiffs do not dispute that Ms. Keal was able to appeal
20 the termination of visitation. Dkt. 246 at 28. The Report and Recommendation should be adopted as
21 to this claim.

22 **W. REMAINING DEFENDANTS**

23 **1. Bob Moore and Gale D. Munden**

24 The Report and Recommendation recommends that the motion be granted in part and denied
25 in part as to Defendants Bob Moore and Gale D. Munden. *See, e.g.*, Dkt. 240 at 11-12, 14-15, 17,
26 29. These defendants have not appeared in this action and have not moved for summary judgment.

1 It appears that the plaintiffs provided marshal service forms for these defendants. *See* Order
2 Directing Service by U.S. Marshal, Dkt. 9 at 1 (“By the court[']s count there are 43 named
3 defendants in this action. Plaintiff has provided 43 marshal service forms.”). Bob Moore was not
4 served, however, because he was not at the address provided in the marshal service form. Dkt. 54.
5 Gale D. Munden was also not served. Dkt. 250 (entered March 21, 2007). The plaintiffs should be
6 afforded an opportunity to effect service on these defendants and to demonstrate why the case
7 should not be dismissed for failure to prosecute as to these defendants.

8 **2. Steve Ramsey, Susan Winters, Bryan McGarvie, and Les Schneider**

9 The Report and Recommendation concludes that summary judgment is proper as to these
10 defendants because liability is based upon *respondeat superior* and placement of Mr. Keal on
11 Intensive Management Status. Dkt. 240 at 28-29. The objections fail to refute the conclusion of the
12 Report and Recommendation, that the plaintiffs fail to establish a liberty interest in remaining in the
13 general population, and summary judgment is therefore proper as to these defendants.

14 **III. ORDER**

15 The Court, having reviewed the file the Report and Recommendation of Magistrate Judge J.
16 Kelley Arnold (Dkt. 240), the objections to the Report and Recommendation, and the remaining
17 record, does hereby find and **ORDER**:

18 (1) The Court **ADOPTS in part** the Report and Recommendation (Dkt. 240) as provided
19 herein;

20 (2) The Motion for Summary Judgment (Dkt. 204) is **GRANTED** as to the remaining claims
and defendants, with the sole exception of the excessive force claim against Steve Weed;

21 (3) with respect to the plaintiffs’ excessive force claim against Steve Weed, the parties shall
22 provide the Court with supplemental briefing as follows:

23 (A) on or before April 6, 2007, the defendants shall supplement Defendants’ Motion
for Summary Judgment (Dkt. 204) to address the plaintiffs’ excessive force claim
24 against Steve Weed for events occurring on November 17, 2003;

25 (B) the plaintiffs’ response to the defendants’ briefing, if any, is due April 23, 2007;

26 (c) the defendants’ reply, if any, is due April 27, 2007; and

27 (D) this portion of the Report and Recommendation is **RE-NOTED** for consideration

1 on Magistrate Judge Arnold's April 27, 2007, calendar.

2 (4) on or before April 23, 2007, the plaintiffs are **ORDERED** to


3 (A) show cause, if any they may have, why the claims against Bob Moore and Gale D.
4 Munden should not be dismissed for failure to prosecute or

5 (B) effect service on these defendants.

6 (5) This matter is re-referred to Magistrate Judge J. Kelley Arnold.

7 The Clerk is directed to send copies of this Order to plaintiffs, counsel for any defendants
8 who have appeared, and to the Hon. J. Kelley Arnold.

9 DATED this 23rd day of March, 2007.

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11 Robert J. Bryan
12 United States District Judge
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